(244)

A.F.R.

14-02-2006

HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR

SINGLE BENCH : HON'BLE SHRI S.R. NAYAK, CJ

WRIT PETITION NO.5153 OF 2005

O R D E R

POST IT FOR PRONOUNCEMENT
OF ORDER ON: **14/02/2006**

Sd/-
Chief Justice

(245)

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WRIT PETITION NO.5153 OF 2005

PETITIONER		M/s Indian Bicycle Manufactures Association, A society registered under the Society Registration Act, 1860 Registered address E-650 Phase V Focal Point, Ludhiana (Punjab)
	Vs.	
RESPONDENTS	1.	State of Chhattisgarh Through the Secretary Department of Industries D.K.S. Bhawan, Mantralaya Raipur (Chhattisgarh)
	2.	Chhattisgarh State Industrial Development Corporation Limited (a Government of Chhattisgarh Undertaking) through Managing Director, Ground Floor, LIC Commercial Complex Pandari, Raipur (C.G.) 492004
	3.	M/s Hero Cycles Ltd. (Ludhiyana) 503, Tulsiani Chambers, 5th Floor Nariman Point, Mumbai 400021.

Present : Mr. Kanak Tiwari, learned Sr. Adv., with Mr. Prateek Sharma, learned counsel for the petitioner.

Mr. Prashant Mishra, learned Addl. Advocate General, with Mr. Sanjay S. Agrawal, learned Govt. Adv., for the State of Chhattisgarh.

Mr. Ayaz Naved, learned counsel for respondent No.2.

Mr. Goutam Bhaduri, learned counsel for respondent No.3.

ORDER

(Passed on of February, 2006)

In this writ petition, the action of the Chhattisgarh State Industrial Development Corporation Ltd., the second respondent herein, which is a Govt. of Chhattisgarh undertaking in awarding the contract in

favour of M/s Hero Cycles Ltd., the third respondent herein, for supply of 49,603 ladies bicycles to the Department of Tribal Development and the Department of School Education, is assailed.

(2) The facts of the case, in brief, are as follows:

The Department of Tribal Development, State of Chhattisgarh issued notification on 30th July 2005 calling for tenders for purchase of 11,558 ladies bicycles for school-going tribal girls. According to the aforesaid tender notification marked as **Annexure-P/2A**, the 'tenderer' specified in Clause 20 would mean 'manufacturer and also the authorized representative of the manufacturers'. No financial restriction/eligibility clause with regard to turnover of the business of the tenderer was prescribed. However, the aforesaid tender process was withdrawn and on 14/09/2005, the second respondent which is statutory Corporation functioning under the Department of Industries, Govt. of Chhattisgarh State, floated tenders for purchase of 49,603 ladies bicycles on behalf of the Department of Tribal Development and also Department of School Education, vide **Annexure-P/2.** Vide condition No.24 of **Annexure-P/2** it was incorporated that;

> **"a. Tenders are invited from original Indian Manufacturers/authorized agents only ....." And**
>
> **"b. Tenderer should have minimum yearly turn-over of Rs.50 crores or more. Regarding this, tenderer must submit their past performance report for last 3 years".**

The tenders were to be submitted by 06/10/2005 but an addendum was issued to the aforesaid terms and conditions after the tenderers had purchased tender forms including among them also the Madhya Pradesh

Laghu Udyog Nigam, a statutory Corporation. The addendum marked as **Annexure P-3** stipulates that **"tenders are invited from original Indian Manufacturers only who fulfil the pre-qualification criteria given in the tender document"**. As such the expression 'authorized agents' were deleted. This invited protest from the organization like Madhya Pradesh Laghu Udyog Nigam, a statutory Corporation constituted by the erstwhile State of Madhya Pradesh (for short 'the M.P.L.U.N.') which consists the members of the petitioner – Association as its constituent members contending *inter alia* that in accordance with the World Bank norms one-third of the annual turnover capacity demanded would be enough and the prescribed minimum turnover of Rs.50 Crores of the tendered item in each of the last three years i.e. 2002-03, 2003-04 and 2004-05 is arbitrary and unreasonable. It was also contended by the objectors that the last year also the third respondent and other big manufacturers had formed a cartel while quoting prices of such bicycles to be supplied to the State of Madhya Pradesh and in the circumstance, the Chief Minister of the said State intervened and awarded the contract of supply of the bicycles to the small manufacturers under the patronage and agency of M.P.L.U.N. A copy of the representation made by the petitioner – Association is produced and marked as **Annexure P-6**.

(3) The second respondent received only three tenders and they were opened on 06/10/2005. It was found that the third respondent, M/s Atlas Cycles and M/s Avon Cycles had quoted almost the same prices with a variation of only 0.50 Paisa. The purchase committee in its report marked as **Annexure R-4** has recorded its minutes on 08/10/2005 opining that the aforementioned three big manufacturers – tenderers formed a

cartel for supply of bicycles. Even the respondents, as could be seen from their return, agree that the aforementioned three bidders had formed a cartel, but according to them, to break that cartel they decided to negotiate with one of the bidders, i.e., the third respondent herein, who had quoted the lowest rate for supply of bicycles by 0.50 Paisa margin. Therefore, they negotiated with the third respondent and ultimately the third respondent agreed to supply the required quantity of bicycles at the rate of Rs.1,724/- including all taxes per bicycle as against its own lowest quotation of Rs.1,820/- per bicycle. According to the respondents, this has resulted in saving of Rs.96/- per bicycle or in aggregate Rs.47.62 Lakhs to the Government Exchequer. Thus, the second respondent awarded the contract of supplying bicycles to the third respondent. In the circumstance, the petitioner – Association has filed this writ petition for annulling the contract granted in favour of the third respondent and also to quash the conditions incorporated in the tendered document vide amendment dated 14/09/2005 to the effect that a tenderer should have minimum yearly turnover of Rs.50 Crores or more and he should submit their past performance report for the last three years as arbitrary and unreasonable and violative of Article 14 of the Constitution of India. The petitioner – Association has sought for a direction to issue fresh tender for supply of ladies bicycles after deleting the aforesaid condition of annual turnover of Rs.50 Crores.

(4) The petitioner initially did not implead the third respondent as a party respondent to this writ petition. The petitioner impleaded the third respondent by filing I.A. No.9750 of 2005. The petitioner by filing I.A.

No.9674 of 2005 amended the writ petition by taking certain additional grounds.

(5) The writ petition is opposed by the respondents 1 and 2 by filing statement of objections/return. In the return, it is stated that the pre-qualification bids were opened on 06/10/2005 and technical bids were opened on 07/10/2005 and it was minutely scrutinized and it was found that three bidders, namely, M/s Atlas Cycles, M/s Hero Cycles and M/s Avon Cycles had virtually formed a cartel. Therefore, to break that cartel, it was decided by the purchase committee to negotiate with the third respondent who had quoted the lowest rates for supply of bicycles by 0.50 paisa margin and in the negotiations, the third respondent had agreed to supply the required quantity of bicycles at the rate of Rs.1,724/- including all taxes per bicycle as against its own lowest rate of Rs.1,820/- per bicycle resulting in saving of Rs.96/- per bicycle or in aggregate Rs.47.62 Lakhs to the Government Exchequer. It is also stated that the purchase committee considered the representation of the petitioner – Association and it was found that the allegations made were baseless. It is also stated that the purchase committee before taking decision to award the contract in favour of the third respondent considered other factors, such as local market rates, rate of M.P.L.U.N., quality of product and assured supply within stipulated period. In pursuance of the above decision, an agreement was entered into with the third respondent on 25/10/2005 and in pursuance of the said agreement, purchase orders were placed on 25/10/2005. It is stated that the contract is awarded to the third respondent keeping in mind the assured supply within the stipulated time and to purchase standardized ISI conforming goods and saving of money

to the Public Exchequer. It was also stated that the purchase committee felt that it was desirable to purchase goods directly from the original manufacturer avoiding Assemblers, Dealers and Agents. The respondents have also sought to support the condition that the tenderers should have annual turnover of Rs.50 Crores for the last three years.

(6) The third respondent also opposed the writ petition by filing a separate statement of objections/return by contending that the terms of invitation and acceptance of tender are not opened to judicial scrutiny; the contract awarded to the third respondent by the second respondent after thorough scrutiny of the offer and series of discussions and negotiations with the guarantee of supply as also the quality could not be condemned as arbitrary or discriminatory or is actuated by malice. It is stated that the third respondent is the biggest cycle manufacturer in the world and the bicycles manufactured by it match the world standard and norms.

(7) The petitioner filed the rejoinder on 16/11/2005 by filing I.A. No.9588 of 2005, first additional rejoinder on 03/12/2005 and second additional rejoinder on 06/12/2005. The third respondent has also filed the rejoinder.

(8) I have heard learned counsel for the parties. Shri Kanak Tiwari, learned Senior Counsel who appeared for the petitioner would advance multi-panged arguments to attack the impugned tender proceedings and the award of contract in favour of the third respondent. It was contended that the decision of the second respondent to oust the agents of the manufacturers was a deliberate, conscious, dishonest act and therefore, the whole tender proceedings are vitiated. It was

contended that the second respondent fully knowing that the MPLUN being a public sector undertaking of the erstwhile/present State of Madhya Pradesh having been successfully operated identical contracts thereby saving crores of rupees to the Public Exchequer had mischievously/deliberately sidelined the members of the petitioner – Association by incorporating conditions which are totally arbitrary and discriminatory. It was contended that the restrictive condition of an annual turnover of Rs.50 crores minimum imposed by the second respondent is a deliberate and malicious act to oust the competitive trading companies so as to create monopoly of trade in favour of 3 to 4 big companies in the country. It was also contended that insertion of the condition of minimum annual turnover of Rs.50 crores is a clear illustration of encouraging cartel / vicious circle to be formed so that the Public Exchequer is robbed of. In sum and substance, it was the contention of Shri Kanak Tiwari that the conditions imposed by the second respondent to oust the members of the petitioner – Association in the tender proceedings and in awarding the contract of supply of bicycles in favour of the third respondent *ex facie* violates the postulates of Articles 14, 19(1)(g), 19(6) and 21 of the Constitution of India.

(9) Shri Prashant Mishra, learned Additional Advocate General appearing for the respondents 1 and 2, *per contra*, while supporting the impugned tender proceedings and the action of the second respondent in awarding the contract in favour of the third respondent – Company, at the threshold, would submit that the terms of invitation and acceptance of tender are not open to judicial scrutiny and the terms of the tender are in the realm of contract and the conditions imposed by the second

respondent for the tenderers to participate in the tender proceedings could not be condemned as arbitrary or unreasonable or discriminatory. Shri Prashant Mishra placing reliance on the judgments of the Supreme Court in **Association of Registration Plates Vs. Union of India and others**[1], **Air India Ltd. Vs. Cochin International Airport Ltd. and others**[2], **Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and others**[3], **Krishnan Kakkanth Vs. Govt. of Kerala and others**[4], **Ugar Sugar Works Ltd. Vs. Delhi Administration and others**[5], **Sterling Computers Ltd. Vs. M/s. M&N Publications Ltd. and others**[6], **Union of India and others Vs. Dinesh Engineering Corporation and another**[7]and **Directorate of Education and others Vs. Educomp Datamatics Ltd. and others**[8], submitted that the condition of requirement of having turnover of Rupees Fifty Crores for last three years could not be attacked on any of the permissible grounds and that similar attack has been negatived by the Supreme Court time and again. Shri Prashant Mishra would submit that the Government of Chhattisgarh has evolved a benevolent scheme known as 'Saraswati Yojna' for supplying ladies bicycle free of cost to all the girls students of Class IX and X belonging to scheduled caste and scheduled tribe category studying in the schools run by the Education Department and Tribal Development Department of the Government of Chhattisgarh. It was contended by Shri Mishra that the decision to award the contract in favour of the third respondent was taken

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1. (2005) 1 SCC 679
2. (2000) 2 SCC 617
3. (1997) 1 SCC 738
4. (1997) 9 SCC 495
5. (2001) 3 SCC 635
6. (1993) 1 SCC 445
7. (2001) 8 SCC 491
8. (2004) 4 SCC 19

by the second respondent keeping in mind the public interest and the interest of the school-going girls belonging to the scheduled caste and scheduled tribe and after series of discussions and negotiations with the third respondent to reduce the price of the bicycle without sacrificing the quality of the bicycles and therefore, no ground was made out by the petitioners to interfere with the award of contract made by the second respondent in favour of the third respondent. Shri Prashant Mishra placing reliance on the judgment of the Supreme Court in **Ugar Sugar Works Ltd. Vs. Delhi Administration and others**[5] (supra) would submit that the decision to incorporate condition of Rupees Fifty Crores turnover is a policy decision taken by the respondents and, therefore, the Court should not interfere with such policy decision unless the policy is shown to be totally unreasonably and arbitrary. Lastly, Shri Prashant Mishra would submit that on account of the stay granted by this Court, the supply and distribution of the bicycles to the intended beneficiaries under the Saraswati Yojna is stalled and any further delay in supplying the bicycles to the girls students would defeat the very purpose for which Saraswati Yojna was conceived and being implemented.

(10) Shri Goutam Bhaduri, learned counsel appearing for the third respondent while adopting the arguments of Shri Prashant Mishra, learned Addl. Advocate General and supplementing the same would highlight that in pursuance of the contract awarded to the third respondent, the third respondent had taken all necessary steps to manufacture the parts of the bicycles to see that the required bicycles are supplied without much loss of time. Learned counsel would also tell the Court that though time is lost in the litigation and by virtue of the interim order granted by this

Court, even at this belated stage, the third respondent - Company is in a position to supply the required number of bicycles within the stipulated time-frame.

(11) Having heard learned counsel for the parties, the only thing to be seen by me is whether the petitioner has made out any ground for reviewing the action of the respondents 1 and 2 in awarding the contract of supply of bicycles in favour of the third respondent.

(12) Though a Government contract is a species of the genus contract and is governed by the same law of contract, i.e., the Indian Contract Act, yet it is a thing apart, a class by itself, calling for special and distinct consideration. As the contract involves public interest and public finance is affected, it is subject to certain limitations – constitutional and legal as well – which would not be relevant to a private contract. Though the basic structure of the contract, offer and acceptance, would be of equal applicability to a Government contract, yet, in order to safeguard the public interest involved, certain strict compliance with the constitutional requirement of entering into a contract contained in the mandatory provision of Article 299 of the Constitution of India has to be complied with before a Government contract can become legal, valid and enforceable. At the same time, the Government is bound by Article 14 postulates, i.e., reasonableness, fairness and non-arbitrariness. The Government in awarding contract is expected to practice openness, transparency, objectivity and fairness. Furthermore, in awarding contract, the Government and the Governmental authorities are required to practice the norms of legality, rationality and propriety and they cannot pick and

choose the persons, natural or legal, for awarding the contract at their whims and fancies and their actions in awarding the contract are amenable to judicial review and they could be tested on the touchstone of Article 14 postulates and mandate of Article 299 of the Constitution of India.

(13) The law relating to award of contracts by the State, instrumentalities of the State, statutory bodies and other authorities which could be treated as 'State' within the meaning of Article 12 of the Constitution has been well settled by a catena of decisions of the Supreme Court and High Courts and to mention few are the decisions in **M/s. Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and another[9], Union of India and others Vs. Hindustan Development Corporation and others[10], Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and others[11], M.P. Oil Extraction & another Vs. State of Madhya Pradesh and others[12], West Bengal Electricity Board Vs. Patel Engineering Co. Ltd. and othres[13], Union of India and others Vs. Dinesh Engineering Corporation and another[7]** (supra), **R.D. Shetty Vs. International Airport Authority[14], Fertilizer Corporation Kamgar Union (Regd.) , Sindri and others Vs. Union of India and others[15], Asstt. Collector of Central Excise, Chandan Nagar, WB Vs. Dunlop India Ltd.[16], Tata Cellular Vs. Union of India[17],**

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9. (1975) 1 SCC 70
10. (1993) 3 SCC 499
11. (1997) 1 SCC 738
12. AIR 1998 SC 145 = (1997) 7 SCC 592
13. AIR 2001 SC 682 = (2001) 2 SCC 451
14. (1979) 3 SCC 489
15. (1981) 1 SCC 568
16. (1985) 1 SCC 260
17. (1994) 6 SCC 651

Ramniklal N. Bhutta Vs. State of Maharashtra[18], Raunaq International Limited Vs. IVR Construction Limited[19], M/s Monarch Infrastructure Pvt. Limited Vs. Commissioner, Ulhasnagar Municipal Corporation and others[20], and AIR India Limited Vs. Cochin Int. Airport Ltd. and others[2] (supra). It is true that the award of a contract, whether it is by a private party or by a public body or the State, is essentially, a commercial transaction. In arriving at a commercial decision consideration which are of paramount importance are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny unless such terms could be condemned on the touchstone of Article 14 postulates. Price need not always be the sole *criterion* for awarding a contract. It is free to grant any relaxation, for *bona fide* reasons, if the tender conditions permit such relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedure laid down by them and cannot depart from them arbitrarily. Though the decision taken by them is not amenable to judicial review on merit, the Court can examine the decision-making process and interfere if it is found vitiated by *mala fides*, unreasonableness and arbitrariness and due to violation of the terms and conditions imposed by the authority itself. It is trite law that the State, its corporation, instrumentalities and agencies have the public duty to be fair to all concerned.

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18. (1997) 1 SCC 134
19. (1999) 1 SCC 492
20. 2000 (4) SUPREME 34 = AIR 2000 SC 2272 = (2000) 5 SCC 287

(14) It is pertinent to notice that since the guarantee of equal protection enshrined in Article 14 of the Constitution embraces the entire domain of 'State Action', it would extend not only when an individual is discriminated in the matter of exercise of his rights or in the matter of imposing liabilities upon him, but also in the matter of granting privileges, *e.g.*, granting licences for entering into any business, inviting tenders for entering into a contract relating to Government business, or issuing quotas, giving jobs and in all these cases, the principle is that there should be no discrimination between one person and another if their position or circumstance is the same. In other words, the State's action must not be arbitrary but must be based on some valid principle which itself must not be irrational or discriminatory. It is well established by the Indian Administrative Law that an executive or statutory authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an action taken in violation of them. It needs to be noticed that every activity of the State has the public element in it and must, therefore, be informed with reason and fair play in action and guided by public interest. If the Government awards contracts or otherwise deals with its property or grants any other largesse, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. The public authority cannot exercise its discretion arbitrarily in the matter of giving contracts to a party on its sweet will and pleasure giving a go-by to the norms and procedure prescribed by itself or by law. In other

words, the action of the authority in the matter of awarding contract should inspire transparency and openness and reflect justification and legality.

(15) In the case of **Kumari Shrilekha Vidyarthi Vs. State of U.P.**[21], the Apex Court dealing with the requirements of Article 14 in the sphere of contract entered into by the State, has laid down the following propositions of law :

> "The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed herein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article 14 and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article 14 – non-arbitrariness which is basic to rule of law – from State actions in contractual field is not justified."

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21. AIR 1991 SC 537

It was further observed by the Apex Court in the above case as under :

> 28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public elements for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14."
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> xxx xxx xxx
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> "36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you every so high, the laws are above you'. This is what men in power must remember, always."

(16) Having examined the law relating to award of contracts by the State, instrumentalities of the State, statutory bodies and other public authorities as above, I am of the considered opinion that the impugned award of contract in favour of the third respondent smacks of arbitrariness, unreasonableness and objectionable conduct on the part of the second respondent. As noted above, the Department of Tribal Development, State of Chhattisgarh had initially issued an advertisement on 30/07/2005 calling for tenders for supply of 11,558 ladies bicycles for school-going tribal girls. In response to the said notification, the third respondent and two other big manufacturers had quoted identical price of approximately of Rs.1,730 plus tax per bicycle whereas one of the constituent members of the petitioner Association, namely, M/s Safari Bikes Ltd. had quoted a price of Rs.1,700/-, but, the bid of the aforesaid M/s. Safari Bikes Ltd. was not even opened and was rejected on technical grounds. It is curious that the first respondent cancelled the tender notification dated 30/07/2005 and decided to procure 11,558 number of bicycles along with the additional requirement of the Department of Education, totally 49,603 bicycles through the second respondent – Corporation. Accordingly, the second respondent – Corporation on 14/09/2005 floated tenders for purchase of 49,603 ladies bicycles on behalf of the Department of Tribal Development and also on behalf of the Department of the School Education, vide Annexure-P/2 incorporating the conditions that the tenders are invited from the original Indian manufacturers/authorized agents and the tenderers should have minimum turnover of Rupees Fifty Crores for last three years. These conditions incorporated in Annexure-P/2 left only four companies, namely, the third respondent herein, Avon Cycles Ltd., T.I.

Cycles of India and Atlas Cycles (Haryana) Ltd. as eligible to submit tenders and all other manufacturers of bicycles in India are denied the right to participate in the tender process. Therefore, the first question would be whether the second respondent is justified and legally acted in excluding all other manufacturers and agents of manufacturers except four big manufacturers of bicycles in the field of competition and the said action on the part of the second respondent violated any of the legal or Constitutional rights of the members of the petitioner – Association and similarly circumstanced others. It is needless to state that when State or instrumentalities of State want to part with their largesse, it is guaranteed right of a person/citizen by virtue of Article 14 of the Constitution to apply and to be considered for grant of largesse subject to his fulfilling formalities and qualifications. No-doubt, the State is entitled to prescribe qualifications for a person to compete for award of contract but it cannot impose conditions/qualifications which are arbitrary in the assessment of the Court so as to deny opportunity to a person/citizen to trade with it. In other words, the State cannot arbitrarily deny any individual opportunity to trade with it and the individual is entitled to fair and equivalent treatment with others. The exercise of the executive functions in the matter of trade and making of contracts is always subject to Part-III of the Constitution. In the matter of making public contracts, the State has to provide equality of opportunity. While exercising the right to trade and enter into the contracts, the State is under obligation to observe equality whereas ordinary citizens are free to choose not to deal with any person whom they do not like. The State has duty to observe equality in such matters.

(17) Secondly, it needs to be noticed that though the State has power to prescribe eligibility conditions for tenderers, the eligibility conditions that may be imposed by the State should have rational nexus to the object to be achieved and such condition cannot be arbitrary or fanciful. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade on par with private individuals. However, the State has the duty to observe equality. In other words, an ordinary individual can choose to deal with any person at his discretion and sweet will, but, the Government cannot choose to exclude persons by discrimination. A person who has been dealing with the State or public authorities in the matter of sale and purchase of materials has the legitimate interest or expectation and when the State acts to the prejudice of a person, it has to be supported by legality. Under our Constitution, the Government is a Government of laws and not of men. It is true that no-one can insist that he has any right to enter into a contract with Government, but, every person is entitled to equal treatment with others who are similarly circumstanced to offer tender or quotations for sale or purchase of the materials. This privilege is granted to an individual, because, it is the Government which is trading with the public and the democratic form of the Government demands equality and absence of arbitrariness and discrimination in such transactions. It is needless to state that the activities of the Government have a public element and, therefore, there should be fairness and equality in its activities. The State need not enter into a contract with anyone, but, if it does so, it must do so fairly without discrimination and without unfair procedure.

(18) In this case, there is a missing link as to what transpired between the first respondent and the second respondent between tender notification dated 30/07/2005 and tender notification dated 14/09/2005. Even the return filed by the respondents does not disclose the circumstances or any policy decision being taken either by the first respondent or by the second respondent to incorporate the condition of Rupees Fifty Crores turnover between the above two dates. Even assuming that such a policy decision was taken by the respondents between 30/07/2005 and 14/09/2005, that policy decision should stand the scrutiny of Article 14 of the Constitution. It is true that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of *mala* fide, unreasonableness, arbitrariness or unfairness etc. In other words, arbitrariness, irrationality, perversity and *mala fide* will render the policy unconstitutional. It is, however, true that if the policy cannot be faulted on any of the above grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy. In this case, for the reasons stated hereinabove and below, the condition of Rupees Fifty Crores turnover incorporated in the tender notification, if taken to be a policy decision, nevertheless, cannot be upheld for it suffers from vices of arbitrariness and irrationality.

(19) It is the specific allegation of the petitioner – Association that the first notification dated 30/07/2005 was withdrawn and fresh tender notification was issued on 14/09/2005 incorporating the condition of Rupees Fifty Crores turnover *mala fide* and for extraneous corrupt considerations in order to favour only the aforementioned four biggest

companies manufacturing bicycles in India and to exclude all other manufacturers from competition. At the outset, it needs to be noticed that bicycle is not such an article manufacture of it or technology involved in its manufacture could be undertaken only by industrial giants and not by medium or small scale industries in order to maintain quality and prompt supply. The scenario of manufacture and supply of bicycles to several Governments is well-laid before the Court by the petitioner. It is stated that until last year in the erstwhile State of Madhya Pradesh, the supplies of ladies bicycles to the State were made by the manufacturers and their agents on competitive basis so as to arrive at the lowest possible workable rate with guarantee of supply within the schedule time-frame without sacrificing quality and promptitude in supplies. In the second additional rejoinder filed by the petitioner to the additional return filed by the third respondent, it is stated that the Government of Rajasthan, Tribal Area Development, Udaipur last year vide tender reference No.CTAD/1/CYCLE PURCHASE/2004-05 opened on 24-3-2005 had incorporated the condition of production capacity of 50,000 bicycles, but it did not put any condition of turnover with the result that they got the competitive rates according to the market price at that time. It was also pointed out that the Government of Jharkhand in tender notification referred to by the third respondent in its return had incorporated a condition of 50,000 production capacity and turnover of Rupees Seventeen Crores only. It is also pointed out that recently the same Tribal Welfare Department of Government of Jharkhand floated tender for 50,000 bicycles to be opened on 16-12-2005 wherein the turnover has been reduced to Rupees Fifteen Crores in order to allow fair competition.

It is also stated that they have even allowed bicycles dealers who have Rupees One Crore turnover to compete. It is also pointed out that the Government of Haryana vide tender notice No.12/2005-2006 opened on 1-12-2005 allowed all the bicycle manufacturers irrespective of their turnover and they have received much lower prices. Therefore, stringent condition of annual turnover of Rupees Fifty Crores as minimum, in the facts of the circumstances of the case, could not be regarded as reasonable condition. It needs to be noticed that the cost of 49,603 bicycles to be supplied to the second respondent under no circumstance would come to Rupees Ten Crores. It is stated that the several members of the petitioner – Association have achieved financial eligibility of Rupees Ten Crores and more. The condition of Rupees Fifty Crores minimum turnover incorporated by the second respondent is also not in conformity with the World Bank norms. Even the World Bank norms do not postulate/stipulate such a stringent condition and international contracts are being awarded on such World Bank norms having been universally accepted even by the respondents. The World Bank norms would require the financial capacity of at the most 1/3rd of the amount for which the supplies are to be effected under any tendering systems. There is absolutely no rational nexus between the demand of 49,603 bicycles made in the tender and the condition of turnover of Rupees Fifty Crores per annum for the last three years imposed in the tender. In other words, the condition of Rupees Fifty Crores turnover is totally arbitrary and it cannot be allowed to stand.

(20) Shri Prashant Mishra, learned Addl. Advocate General would, however, contend that the Supreme Court in **Directorate of**

Education and others Vs. Educomp Datamatics Ltd. and others[8] (supra) has upheld the prescription of similar turnover condition and therefore, no exception could be taken to the condition of Rupees Fifty Crores turnover incorporated in the tender in this case. But, in my considered opinion, the above case decided by the Hon'ble Supreme Court could be distinguished on facts. In that case, the Directorate of Education, Govt. of N.C.T. of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under the tender document for leasing of supplying, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-03, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs.100/- Crores, the competent authority took a decision after consulting the Technical Advisory Committee for finalization of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs.20 Crores over the last three years. The hardware cost itself was to be Rs.40-45 Crores. The Government introduced the criterion of turnover of Rs.20 Crores to enable the companies with real competence having financial stability and capacity to participate in the tender, particularly in view of the past experience. When the above prescription of the condition of turnover of Rs.20 Crores was assailed before Delhi High Court, Delhi High Court had opined that the condition of Rs.20 Crores turnover did not have a nexus with either the increase in the number of schools or the quality of education to be

provided. The Supreme Court having found that the company which had made the grievance had a turnover of Rs.2 Crores only and, therefore, it might not have the financial viability to implement the project. In such facts-situation, the Hon'ble Supreme Court disapproved the opinion of the Delhi High Court. In this case, the facts are altogether different. As pointed out supra, the total cost of bicycles to be supplied under the contract is less than Rs.10 Crores and, therefore, the prescription of condition of Rs.50 Crores turnover for the last year would not stand the test of rationality.

(21) In **M/s Dhar Cement Ltd., and others vs. State of M.P. Thr. Secretary; Ministry of Irrigation Government of M.P. Bhopal and others**[22], the Madhya Pradesh High Court has held that the eligibility condition of production capacity of 4,00,000 Metric Tonnes of cement per year in a tender floated for supply of 4,000 Metric Tonnes and 5,000 Metric Tonnes as arbitrary and did not have any rational nexus with the quantity asked to be supplied under the tender notices and thus unfairly excluded the petitioner therein from filing tender in both the cases. Similarly, in **Adarsh Matsyodyog Sahkari Sanstha Ltd. vs. M.P. Rajya Matsya Vikas Nigam and others**[23], the Madhya Pradesh High Court has held that the condition of experience of fishing 800 M.T. fishes from one reservoir out of three, in one year, in a tender for fishing is arbitrary and accordingly quashed.

(22) It is further alleged that the aforesaid four companies are/have been in the habit of making cartel and quoting rates under

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22. AIR 1993 M.P. 251
23. 1995 JLJ 682.

mutual understanding with the object of obtaining of a monopoly in supplies of bicycles. In identical circumstances, to supply bicycles last year in the State of Madhya Pradesh, the aforesaid four companies had quoted rates of Rs.1,898/- per bicycle although the M.P.L.U.N. had also quoted its rates as agent of one of the constituent members of the petitioner – Association. It is stated that due to the timely intervention of the Chief Minister of that State, the rates were negotiated with the agency of the M.P.L.U.N. for the constituent members of the petitioner – Association and the rates were agreed upon for supply of bicycles at Rs.1,650/- per bicycle and as a consequence thereof, the State of Madhya Pradesh saved huge amount and the rates quoted by the aforesaid four companies were not acted upon.

(23) There is no need for this Court to dilate on the question whether the aforementioned three companies formed cartel or not. In the tenders, the aforementioned three companies had quoted almost the same prices with a variation of only fifty paisa. It could not be an accidental or incidental price uniformity. On an earlier occasion also, they had formed similar cartel to eliminate others from competition and to monopolize the business of supply of bicycles to the State of Madhya Pradesh for use of the Directorate of Public Instructions, the fact stated by the petitioner, is not seriously disputed by the respondents.

(24) In para 5.4 of the writ petition, the petitioner has alleged that the three big companies having failed in their attempt before the Government of Madhya Pradesh again formed a cartel and exercised undue influence on the officers of the respondent No.2 and resultantly

respondent No.2 inserted the condition of Rupees Fifty Crores turnover in the tender notification. It is also stated that the petitioner – Association learning of the aforesaid amended conditions sent representation to the Governor and Chief Minister of the Chhattisgarh State and the copies of the same are annexed as Annexure P/6. In the aforesaid communications, the petitioner – Association has alleged that the corruption had played its role for the second respondent to incorporate new conditions in order to favour the aforesaid four companies who would certainly quote their rates under some tacit mutual understanding so as to rob the State of legitimate rates that otherwise would not be chargeable if such supplies are made by other smaller companies/suppliers who are registered as medium scale or small scale industries. In the representation, it was also stated that in earlier tender No.10546 dated 30/07/2005 of the State of Chhattisgarh, the aforesaid four companies had quoted price of Rs.1,730/- after forming a cartel whereas the bicycles were already sold out to present State of Madhya Pradesh at Rs.1,630/- per bicycle by others.

(25) There is no dispute and there cannot be any dispute that the aforementioned big companies have been in the habit of forming cartel while competing for award of contracts to supply bicycles to the States and the Corporation like the second respondent. In the instant case, the Tender Purchase Committee itself has opined that the third respondent, M/s Atlas Cycles (Haryana Ltd.), and M/s Avon Cycles Ltd. Ludhiana had formed a cartel. The following extracts from the proceedings of the Tender Purchase Committee marked as Annexure-R/4 are quite revealing and relevant to the decision-making and they read as follows:

"Tender Vide No.C-1/MKD/UR/2005-06/TD&ED/004 dated 14/9/2005 was issued by the CSIDC for supply of bicycles and the opening date for the same was fixed for 6/10/2005, 5 tender forms were sold against that and during the opening of the tender forms on 6/10/2005 at 4.00 pm, only 3 tenders were received from the tender box the details whereof are as follows;

1. M/s Atlas Cycles (Haryana) Limited Ludhiyana
2. M/s Hero Cycles Limited, Mumbai
3. M/s Avon Cycles Limited, Ludhiyana

The tenders received were opened for pre-qualification bid on 6/10/2005 at 4.00 pm before the Chairman of the Tender Purchase Committee in presence of the tenderers. According to the conditions of the tender provision was made to open the technical bid, of the tenderers found successful in the pre-qualification bid, on 7/10/2005 at 2.00 pm of which the details are enclosed;

As mentioned above on 7/10/2005, the technical bid was opened in presence of the tenderers and evaluation was made. All 3 aforesaid tenderers were successful technically. Thereafter, the committee inspected the samples of bicycles given by the tenderers and found them as per tender conditions. Thereafter, on 7/10/2005, at 2.00 pm, the financial bids were opened before the representatives of the tenderers, of which the description is as follows;

1. M/s Atlas Cycles (Haryana) Limited

Rate per Bicycle	Basic price	Rs.1750.50
	CST	4% additional after the availing on providing Form D)
	Production Tax	Nil
	Supply	25000 pieces (in 4 months)
	Total Amount	**Rs.1820.52**

2. M/s Hero Cycles Limited, Mumbai

Rate per Bicycle	Basic price	Rs.1750.00
	CST	4% additional (Providing form D)
	Production Tax	Nil
	Supply	20,000 pieces (in 4 months)
	Total Amount	**Rs.1820.00**

3. M/s Avon Cycles Limited, Ludhiyana

Rate per Bicycle	Basic price	Rs.1751.00
	CST	4% additional providing form D)
	Production Tax	Nil
	Supply	18,000 pieces

(in 4 months)

Total Amount **Rs.1821.04**

3. On 7/10/2005 the committee perused the rates of bicycles supplied to other departments of the State of Chhattisgarh/other states and found that in the other departments of the State of Chhattisgarh, in the year 2004-05, the supplies were made on the lesser rates than the rates offered to the CSIDC. Although all 3 aforesaid units are the largest manufacturing units of the country and their annual production capacity is in lacs still they have distributed among themselves the required quantity 49,603 pieces of bicycles and the rates also have been filled in at a variance of only fifty paisa per bicycle. The fact is clearly established that all the three aforesaid tenderer units have formed cartel.

4. The representative of the Department of Tribal and Scheduled Castes Welfare, Chhattisgarh Govt. has informed that in their department also, a few months ago, the same 3 units had formed cartel and all of them quoted the same rate of Rs.1730/- per piece (4% additional tax with form D). Due to the aforesaid cartel only the said tender was cancelled. The members of the committee also came to learn that in the State of M.P. also these manufactures had formed cartel and in consequence thereof the Govt. of M.P. cancelled the tender and decided to purchase the cycles from other units. Keeping in view the aforesaid circumstances the members of

the Committee have unanimously decided that the cartel aforesaid must be broken."

Although the Tender Purchase Committee has opined that the aforementioned three big companies formed cartel to rob the Exchequer of the State, quite curiously, it took decision to negotiate with the third respondent. It appears that after negotiations with the third respondent, in several rounds, ultimately, it decided to award contract to the third respondent at the price of Rs.1,724/- per bicycle. What the Tender Purchase Committee did could not be countenanced. In my considered opinion, the Tender Purchase Committee having come to know that the aforementioned three companies had formed cartel to cheat the public authorities and rob the Exchequer of the State ought not to have negotiated with the third respondent which was also admittedly a member of the cartel and awarded the contract in its favour. Notwithstanding the objectionable conduct of the third respondent being a partner of the cartel, it secured the contract at the hands of the respondents 1 and 2, if I may say so, as incentive for the objectionable conduct. Strictly speaking, the third respondent who was being a member of the cartel was liable to be disqualified and blacklisted from participating in the tender process. That is what Article 14 mandated and that is what the values of openness, impartiality and rectitude in public administration should have weighed with the second respondent. The very object for which the aforementioned three companies formed cartel was ultimately achieved at the peril of the public interest as well as at the peril of the rights of medium and small scale industries guaranteed under Article 14 of the Constitution.

(26) There is no difficulty for me to understand why these three aforementioned companies formed cartel. As pointed out supra, all of them quoted virtually the same rates with intention that only a member of the cartel would secure prestigious contract of supply of bicycles. It is very curious to see that though all the three big companies who formed the cartel claimed that they are giants in bicycles productions and they manufacture millions of bicycles every year, in the tenders submitted by them after forming the cartel, the third respondent, M/s Avon Cycles, M/s Atlas Cycles Ltd. in their tenders offered to supply only 20,000, 18,000 and 25,000 numbers of bicycles respectively, totaling 63,000 within the prescribed period of four months. In that view of the matter also, the offers of those three companies ought to have been rejected in *limine*.

(27) It is true that whether in a given case, there was formation of a cartel by some of the manufacturers which amounts to an unfair trade practice, depends upon the available evidence and the surrounding circumstances. In my considered opinion, the Tender Purchase Committee for valid and weighty reasons rightly held that the three aforementioned big companies formed a cartel taking into account not only the fact that all of them have quoted substantially identical rate but also the fact that earlier also they had formed such cartels in order to monopolize the trade in the field of supplies of bicycles. Therefore, it cannot be said that the opinion of the Tender Purchase Committee is based only on suspicion and not on evidence. In **United States vs. Society of Ind. Gasoline Marketers**[24], it was stated thus :

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24. (1979) 624 F 2d 461: 449 US 1078: Law Ed. 2D 801

> "Since in a price-fixing conspiracy the conduct is illegal per se, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since the aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.

In the same case, it was also observed that :

> The critical analysis in determining whether a particular activity constitutes a per se violation is whether the activity on its face seems to be such that it would always or almost always restrict competition and decrease output instead of being designed to increase economic efficiency and make the market more rather than less competitive."

The Supreme Court, in **Union of India vs. Hindustan Development Corporation**[25], has opined that the cartel if established, 'amounts to an unfair trade practice which is not in the public interest' (emphasis supplied). In **Matsushita Electric Industrial Co., Ltd., et al vs. Zenith Radio Corporation et al**[26], it was held thus :

> "A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them."

(28) Since, in this case, even according to the Tender Purchase Committee as well as respondents 1 and 2 the aforementioned three companies formed cartel to monopolize the trade and to prevent healthy competition amongst the manufacturers of bicycles and the formation of such cartel was totally against the public interest, the Tender Purchase Committee ought to have rejected their tenders in *limine*. The submission of Shri Prashant Mishra, learned Addl. Advocate General that the second

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25. AIR 1994 SC 988.
26. (1986) 89 L..Ed. 2d 538.

respondent having noticed cartel formed by the aforementioned three companies wanted to break cartel and, therefore, it decided to negotiate with the third respondent, is hardly convincing or legally tenable. If, in the opinion of the Apex Court, formation of a cartel to monopolize a trade and to prevent healthy competition by excluding others in the business or trade is against the public interest, the State or the second respondent would not be justified in entering into the negotiation with a party or person who had already acted against the public interest. It needs to be noticed that formation of a cartel to monopolize a trade and to dictate terms with regard to prices by excluding others and preventing healthy competition at the peril of public interest is quite objectionable conduct and the persons who are associated with the formation of such cartel should not be allowed to have contracts with the Government and Governmental Authorities or statutory Corporations or other public authorities. Formation of cartel destroys the values of openness and transparency which are absolutely necessary when State and State Authorities and Public Corporations proceed to part with their largesse. It is a historical experience that the open and healthy competitions amongst the tenderers bring good returns to the State for the largesse parted by it. The second respondent ought not to have awarded the contract to the third respondent at the peril of the aforementioned Constitutional values flowing from Article 14 postulates. Looking from any angel, the action of the second respondent in negotiating with the third respondent for price and ultimately awarding the contract in its favour cannot be sustained and it is liable to be nullified on the touchstone of Article 14.

(29) Shri Prashant Mishra, learned Additional Advocate General placing reliance on certain observations of the Hon'ble the Supreme Court in the case of **Ugar Sugar Works Ltd. vs. Delhi Administration and others**[5] (supra), would submit that since the decision to impose condition of Rupees Fifty Crores turnover is a policy decision, the review of that policy decision is very much limited and circumscribed and that policy decision cannot be condemned as arbitrary or unreasonable. This submission is fallacious and not acceptable to me. In the first place, as pointed out supra, no material is placed before the Court to show that respondents 1 and 2 had taken any policy decision to prescribe the condition of Rupees Fifty Crores annual turnover in the tenders between 30-7-2005 and 14-9-2005. In fact, the petitioner has made an application in this case to produce the policy decision, if there is one, before this Court and despite such application, no records are placed before the Court to show that between the aforementioned two dates, any policy decision was taken by the first respondent and/or second respondent to prescribe the condition of Rupees Fifty Crores annual turnover in tender documents.

(30) Before parting with this case, a strong appeal made by Shri Prashant Mishra, learned Addl. Advocate General may be noted. It was submitted that if the Court were to annul the contract awarded in favour of the third respondent, it would result in great prejudice to the tribal girls and other beneficiaries for whom 49,603 bicycles are sought to be acquired by respondents 1 and 2 for distribution. It was highlighted that the beneficiaries under the scheme are totally innocent and they badly require bicycles to reach and return from their respective schools to their residences and any delay in supply of bicycles would affect their studies

and well-being. In that regard, learned Addl. Advocate General would draw my attention to what is observed by the Apex Court in para 17 of the judgment in **State of Madhya Pradesh and another etc., Vs. Ram Ragubir Prasad Agrawal and others**[27]. The observations made in para 17 by the Apex Court in the above judgment was cited, if I may say so, out of context and it has absolutely no bearing or application, in the facts and circumstances of this case, in the decision-making. Be that as it may, even assuming that annulling the impugned contract awarded in favour of the third respondent would delay supply of bicycles to the tribal girls and other beneficiaries under the scheme, that circumstance itself will never be a good ground for the Court not to step-in under Article 226 of the Constitution when it finds that the action of the second respondent in awarding the contract to the third respondent is totally violative of mandates of Article 14 of the Constitution and that the procedure and method adopted by the second respondent for awarding of the contract are objectionable. In a country which is ruled by the rule of law and which adores, nay, worships the Father of the Nation, the means are as important as ends are. Therefore, the appeal made by learned Addl. Advocate General does not deserve my acceptance. Furthermore, it needs to be noticed that if in law a relief is to be given, the consequence of such relief should not be the concern of the Court. The principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, because, it is intended to prevent arbitrariness or favouritism and it is exercised in the

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27. AIR 1979 SC 888

larger public interest or if it is brought to the notice of the Court that in the matter of award of contract power has been exercised for any collateral purpose.

(31) In the result and for the foregoing reasons, the writ petition is allowed and the contract awarded in favour of the third respondent for supply of 49,603 ladies bicycles is quashed. The condition of Rupees Fifty Crores turnover per annum in tender inquiry No.C-1/MKD/UR/2005-06/TD & ED/004 dated 14/09/2005 is also quashed. Now, it is open to the first respondent and/or second respondent to call for fresh tenders for award of the contract for supply of bicycles. In the facts and circumstances of the case, the parties shall bear their respective costs.

Sd/-
Chief Justice